United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7476

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 76-7476

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

P/S

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

and

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-
Appellants-Cross-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

PRO SE BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE PAUL D. RISHER

My name is Paul D. Risher. I am an Additional Defendant on Counterclaim-Appellant-Cross-Appellee. I am a businessman. I am not an attorney, nor do I have any legal training. The attorney representing me when Notice of Appeal was filed, Donald H. Shaw, Esq., withdrew from my representation when opposing counsel, Philip Mandel, Esq., raised an issue of conflict of interest because Mr. Shaw also represents Newburger, Loeb & Co., Inc. I have elected to represent myself pro se.

In the District Court, Judge Owen found me liable for damages, including punitive damages as a part of a conspiracy that had "a deliberate plan ... to injure Gross, Bleich and Donoghue as part of their efforts to take over a new operation on a shoestring and directly enrich themselves...." (Pl-525*, Opinion pp. 18).

That is an incorrect finding. I did nothing wrongful. From the facts established by the trial, I will demonstrate conclusively the following:

I. My personal actions were those of a responsible businessman, who was advised by counsel I believed to be

* Pl will be used to designate Pleadings

competent, not the actions of someone engaged in a conspiracy to do unlawful harm directly or indirectly.

II. The liquidation of Newburger, Loeb in late 1970 or early 1971 would have enormously damaged every entity connected with the company. The allegedly illegal transfer agreement and the activities leading up to it helped Charles Gross, Mabel Bleich and Jeanne Donoghue rather than harming them.

III. Judge Owen erred in accepting the Lauterbach accounting figures rather than Peat, Marwick's. Such a finding is in direct conflict with his findings on "debt forgiveness" - two of his most important findings.

The paragraphs that follow will detail the above points.

INTRODUCTION

Newburger, Loeb & Co. (The "Partnership") was in dire trouble in 1970 (A* 3410-3416, 2732-2737, 4180-4185). Two accountants testified at trial and differed regarding the amount of total loss for Newburger for the year. My brief will ultimately consider in detail the differences between the two, but in either case the losses were substantial.* Peat, Marwick shows in their report (F,K-I, E-957*) total losses of $5,997,642. Irving Lauterbach, testifying for the Defendants, indicated more favorable results, but even under his formulation total losses amounted to $4,532.273. Since the Partnership began the year with total partnership capital of $7,631,595 (E-957, F,K-I), more than half of it was lost during the year.

The firm had repeated contact with the New York Stock Exchange concerning the firm's problems. For example, the Exchange expressed its concern directly to Newburger in a letter dated March 24, 1970 (E-203, P-77*), at a meeting on May 11, 1970 (E-206, P-81), and in a telephone conversation on

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* F,K will be used to designate Finley, Kumble Exhibits.
P will be used to designate Plaintiff's Exhibits.
A will be used to designate Trial Transcript pages in the Appendix.
E will be used to designate Exhibit pages in the Appendix.

June 17, 1970 (E-209, P-83). The concerns finally culminated in a directive from the Exchange on November 17, 1970 (E-1, P-1) that stated:

> "Capital withdrawals within the next 130 days amounts to $1,560,000, including $727,000 during November, 1970; ten general partners with a capital deficiency of $794,000; a limited partner with a capital deficiency of $38,000; excess net capital as of November 12, 1970, amounts to $575,000 with an aggregate indebtedness of $1,647,000, not including the $1,585,000 due to W.E. Hutton & Co., secured by partners' collateral. It is also our understanding that all customers' accounts, securities, and cash have been delivered on a fully disclosed basis to W.E. Hutton & Co. or to other brokers.
>
> It appears from the above that Newburger, Loeb & Co. will be in violation of Rule 325 by the end of November, 1970, and you are hereby directed to maintain at all times until further notice an amount of excess net capital as computed under Rule 325 (REQUIRED EXCESS CAPITAL) equal to $400,000 plus the amount of capital withdrawals scheduled to be made within the subsequent 120 calendar days.
>
> Under the circumstances and in view of your impaired capital position and loss trend, this Department is left with no alternative but to approach the Board of Governors and ask for your suspension under Article XIII of the Exchange's constitution if your "REQUIRED EXCESS CAPITAL" is not met by the close of business on November 20, 1970. A signed merger agreement filed with this Department by the close of business on November 20, 1970, will be acceptable in lieu of the REQUIRED EXCESS CAPITAL.

> In the meantime, you are directed to take every possible anticipatory step to prepare for possible liquidation of your firm, such as discontinuing any purchases for your firm trading and investment accounts, liquidating proprietary positions, and other administrative procedures in the event of a suspension by the Board of Governors."

It was under this impetus that the firm's recapitalization and reorganization culminated in the Transfer Agreement signed on February 11, 1971 (E-39-100, P-24). It will be demonstrated later that the reorganization occurred because nearly all the entities associated with the partnership feared the outcome of liquidation. Under the Transfer Agreement a Delaware corporation, Newburger, Loeb & Co., Inc. (The "Corporation") received as "Transferee" all of the assets and identified liabilities of the Partnership. Entering into that transaction as signatories were: 6 Subordinated Lenders having accounts on December 31, 1970 totaling $1,100,478; 8 Limited Partners having capital accounts totaling $1,997,865; 4 General Partners (1 was withdrawn) having positive capital accounts totaling $898,921; 11 General Partners (4 were withdrawn) having deficit capital accounts totaling $1,485,639; and 3 new incorporators. The source for the above financial

positions is E 951-957, F,K-I. In summary here because it will be important to the brief later, there were 18 signatories to the agreement associated with the Partnership who had positive positions in their accounts totaling $3,997,264. There were 11 signatories associated with the Partnership who had deficit positions in their accounts totaling $1,485,639.

At the center of this lawsuit are 3 individuals who dissented to this transaction and were not signatories. Charles Gross is a withdrawn General Partner having a positive capital position of $129,561 in the Peat, Marwick report (F,K-I, E-957), or since that capital position is in dispute, $337,921 according to Mr. Lauterbach (D-VVVV, E 871-876)*. Mabel Bleich and Jeanne Donoghue were Limited Partners in the process of withdrawing at December 31, 1970 who had positive capital positions totaling $150,000. According to Peat, Marwick, Gross, Bleich and Donoghue's positions totaled $279,561 or according to Lauterbach $487,921.

I was one of the new incorporators. Judge Owen's opinion refers to me as a member of the "new team"

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* D will be used to designate Defendants' Exhibits.

(Pl -510, Opinion pp. 3). My relationship with Newburger began in August, 1970 when I became a consultant to the Partnership through my consulting firm Risher, Muh & Co., Inc. (A-3739). My previous employers had been McKinsey & Co., Inc.; Olin Corp.; and Procter & Gamble. My principal activities as a consultant to Newburger were in cost reduction and the negotiation of a clearing agreement whereby W.E. Hutton & Co. relieved Newburger of its "back office" activities (A 2732-2734). During the Fall of 1970, my role changed from being a consultant to the possibility that I would be a full time employee and an equity participant in Newburger if it were reorganized into an on going corporation (A 2730-2732). There were two efforts to reorganize. The first effort was headed by Fred Kayne, the then Managing Partner of Newburger, but the effort quickly died (A 3456). Mr. Kayne subsequently resigned in mid November, 1970 (A 3479-3481) as a General Partner and returned to his home in California. After Kayne's resignation, a second effort began that ultimately succeeded. In that effort, Robert Muh and I essentially operated the business on behalf of the Partnership, clearing or turning over to the Partnership all substantive

decisions until the reorganization could take place (A-3483, 2888). From mid December on, it was anticipated and disclosed that the succeeding Corporation would be managed by a five-man Executive Committee of which I was one member, and I was to have the title of President (A-1907-1909, 2065, E-221, 224). Mr. Kayne, Mr. Robert Muh, and I were to each have 200,000 shares of voting common stock in the new Corporation. Mr. Charles Sloane was to have 50,000 shares and Mr. Lawrence Berkowitz was to have 30,000 shares. There were to be approximately 1,000,000 common shares outstanding, 870,000 of which had voting privileges. Each of these individuals was considered a member of the new team in Judge Owen's opinion.

The intervening time between mid November, 1970, and February 11, 1971 were hectic, filled with numerous meetings and the record is replete with hard bargaining by all entities. Meanwhile there was inexorable pressure from the New York Stock Exchange: reorganize or liquidate (E-1085, K-L)*. Crises were common (4202-4230, 4234, 4442, E-229, P-97).

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* K will be used to designate Kayne Exhibits.

The final closing on February 11, 1971, was under an ultimatum from the Exchange (E-1088, K-L).

It became apparent during mid January, 1971, that Gross, Bleich and Donoghue were "hold outs" in the transaction (A-1331). Other entities also balked from time to time before and after mid January, but ultimately all but Gross, Bleich and Donoghue participated in the agreement. Discussions were held with Gross, Bleich and Donoghue, and there were instances where it appeared that they too would ultimately agree to the transaction, in a meeting on February 5th, for example (A-1352, 1404). Ultimately, they held out and the transaction closed on February 11, 1970 without their agreement.

Representing the relevant entitles in this transaction except for Gross, Bleich and Donoghue were more than a dozen law firms (E-155, P-52). Prominent among them were Wilkie, Farr; Stroock, Stroock & Levan; Rickenthal, Abrams & Moss; Rosenman, Colin; and White & Case. Most had at least one representative at the closing on February 11, 1970 (A-1360). Mr. Gross was represented by Mr. Philip Mandel of Golden, Wienshienk & Mandel. Ms. Bleich

and Ms. Donoghue were represented by Mr. Arthur Silverman of Golenbock & Barell.

I submit and will detail that my actions were those of a responsible businessman. Newburger was in trouble. I was a businessman whose managerial experience enabled me to play a role in Newburger's reorganization. Among those who faced the possibility of losses if the company failed, the prevailing mood was, by a large margin, to reorganize and thereby extend the life of the company with attendant hopes for subsequent recovery. Perhaps of legal irrelevance, but continuation of the company was also the mood of Newburger's more than 100 employees. It is a mis-characterization to indicate that even the slightest motive on my part of the reorganization was to damage Gross, Bleich or Donoghue.

POINT I

MY PERSONAL ACTIONS WERE THOSE OF A RESPONSIBLE BUSINESSMAN, WHO WAS ADVISED BY COUNSEL I BELIEVED TO BE COMPETENT, NOT THE ACTIONS OF SOMEONE ENGAGED IN A CONSPIRACY TO DO UNLAWFUL HARM DIRECTLY OR INDIRECTLY.

I was a willing participant in the effort to save

Newburger. Certain of my activities have now been found as wrongful and part of a conspiracy. I disagree strongly with the finding and will detail my involvment with each of the allegedly wrongful activities in the paragraph that follows.

Judge Owen mentions at pp. 19(Pl -526) my meeting with Mabel Bleich. It is one of two instances where I am an identified, individual actor in the alleged conspiracy. Ms. Bleich's testimony as trial differs with her testimony on deposition, which was made a part of the Trial Record, and her testimony differs with mine in either case. At trial she said, I threatened a law suit on the Buckley claim and told her she would be sorry (A-4394-4398). On deposition she said, I told her there would be trouble about the Buckley claim (A-4399). At trial, she said, I made her cry (A-4398). On deposition, she did not say I made her cry (A-4399). At trial, she claimed her recollection was better on trial because she could see my face (A-4399, 4400). I testified that I met with Ms. Bleich to attempt to find out why she had withdrawn from the transaction

after being a signatory to the preliminary agreement on December 30, 1970. I asked her if she realized what would happen if the company were liquidated. I asked her if she understood the seriousness of the matter. I asked whether Gross had advised her. I told her that if the deal did not go through there would probably be extensive litigation. Tears came to her eyes. I ended the conversation. I did not threaten her. I did not say "we've got the Buckley claim" (A-4429-4431).

I do not see why it is wrong to meet with a material party and mention any and all relevant factors in a situation that is as rife with negotiations as this one. That is so no matter whose version you accept of the meeting.

The second and only other time that Judge Owen refers to me as an actor in an identifiable, individual role concerns the "in kind" securities, on pp. 11 and 25 of the Opinion (P1-518, 532). Mr. Kayne wrote me a letter regarding the "in kind"

securities (E-847-849, D-XXX). I have no control over who writes me or what they say. I testified that I ignored the letter, did not act on it in any fashion, and disagreed with the intent of the Sterm letter attached to Kayne's (A-5934-5951). No evidence was brought out that I acted on the basis of Kayne's letter and Judge Owen has no basis for finding that the securities were seized and sequestered at pp. 11 and purloined at pp. 26 of his decision (Pl-518, 533). If the warrants had been distributed, adjustments should have been made by the Partnership in their books and records, but no such adjustment was made. If indeed the securities were distributed, then the Partnership misrepresented their warranty in the Transfer Agreement that they had good title to all assets being conveyed (E-39, 40, P-24). In addition, Judge Owen at pp. 25 (Pl-532) sees this as a distribution of Partnership profits. There were no Partnership profits. And if there had been then the Limited Partners were also entitled to a share according to Section VI, Paragraph 6.2, pp. 21 of the Partnership Agreement (E-432, D-U). Finally, only Gross among the General Partners makes such a claim. No evidence was brought out at the trial that

Messrs. Leo Sterm, Richard Sterm, Adolphus Roggenburg, or Edward Holt, all partners with positive capital, made such claims.

The next most important element of the allged conspiracy concerns the Buckley matter. The Buckley matter came to my attention in December, 1970 (A-2890) as one of several uncollected receivables from Newburger customers. The Buckleys are customers who caused Newburger a loss of more than $300,000 and claimed an inability to pay by reason of lack of resources and the existence of a claim against Newburger, Lawrence Berkowitz, Newburger's In[illegible]se Counsel with substantial experience in the securities business (A-899) was handling the matter as one of several litigations (A-1893-1909, 941-967). He discussed the matter with me and gave me a memorandum dated December 7, 1970 (E-943, F,K-B). Mr. Berkowitz recommended settlement on the basis being proposed by Persky. I did not find reason to disagree and alerted the Partnership (E-942, F,K_A). The taking of the assignment against Gross was Mr. Persky's idea (A-1299-1301, 1323-1325), and I was informed after the fact about the assignment (A-2898, 2899) proposal. I did not demur at any time. What would the Courts have had me do? I had no in depth knowledge of the Buckley

account or legal details. I received a recommendation from 2 independently associated, experienced securities lawyers whom I trusted. I had no basis to reject their advice. I informed the Partnership before the settlement, giving them the opportunity to reject or modify the settlement (E-942,F,K-A). No contradictory evidence was brought forth at the trial. The Buckley assignment with regard to Gross was another source of recovery against losses sustained by Newburger, and my mission at that time was to identify and pursue every single real or potential asset Newburger might have (A-2899-2904, 2930, 2931).

My role in the opinion letter (E-135, 136, P-43) furnished by Persky is further removed. The first time I became aware that the Rosenman firm would not give an opinion on the transaction was the night of February 11, 1971 (A-2932, 2956). No contrary evidence was brought forth. Judge Owen has no basis on pp. 17, footnote 23, (E-524) for his decision that Persky's letter to all counsel (E-656, D-Z) related to Section 98. Persky testified and was not contradicted that the letter related to an insistence on the part of

Subordinated Lenders and Limited Partners that no one get cash out ahead of them (A-1353, 1354). The Subordinated Lenders and the Limited Partners ultimately changed their minds, feeling they would be damaged more through liquidation than by permitting 2 Limited Partners accounting for $150,000 in capital to get priority (A-1353, 1354). I accepted the correctness of Persky's opinion letter after getting a verbal assurance from him (A-2947, 2956). No other attorney present, other than Burak, raised any questions that I am aware of and there were numerous attorneys at the closing, representing Limited Partners, Subordinated Lenders and General Partners in positive capital positions as well as those representing General Partners in deficit (A-1037). Mr. Burak permitted his client to sign the agreement. (Judge Owen seems to think at pp. 17(P1-524) of his Opinion that only one lawyer representing sellers was present, but that is contrary to the evidence.) If skilled attorneys found no basis for challenge, how could I be expected to? If I had known the opinion was incorrect, the simple way of avoiding the problem would have been to attempt to waive the requirement. No evidence indicating an attempt at waiver was brought out.

No evidence was brought out at the trial that I had any involvement with the Kayne/Sloane lawsuit against Gross, other than being aware of it (A-2878, 2879), being present when Persky called Kayne about the January 15, 1971, meeting with Mandel (A-1290), and giving testimony at the resulting arbitration about the value of Newburger Loeb stock. Mr. Gross testified that Kayne said he would drop the suit if Gross joined the transaction (A-2346,2521). Kayne's testimony is in opposition on this point (A-3514, 3515). But there is no evidence that I even knew of the meeting, before or after. Kayne says he only told Sloane and Muh (A-3516, 3517). There was no evidence that I or Newburger would in any way benefit if Kayne and Sloane were successful in their suit. Kayne and Sloane's suit arose out of an independent grievance on their part, and the evidence was that they pursued it solely for their own purposes.

I attended the meeting in Mr. Mandel's office on January 15, 1971 (A-2909). I remembered claims being discussed and legal bars to the transaction that were not familiar to me (A-2942, 2988-2991, 4437-4440).

I met Mr. Gross in August, 1970, spoke with him once or twice at that time (A-2764, Tr. 3803) and did not see him again until January 15, 1971. In the intervening time, I played a contributory role in solving a large number of problems affecting Mr. Gross directly, which will be detailed later. The structure of the reorganization had already been developed in a December 30, 1970 meeting (A-1633-1644). More than a dozen law firms were involved and working in a somewhat unified manner in the direction of completing the reorganization (A-2908). In other words, the reorganization was nearly complete before Gross made known the extent of his dissent. I was interested in saving a company - not malice towards Gross or Bleich or Donoghue. Between January 15, 1971 and the closing, there was at least one occasion, February 5, 1971, where it appeared that Mr. Gross and through him Ms. Bleich and Ms. Donoghue were going to agree to the transfer (A-1101-1104). Prior to January 15th, Bleich and Donoghue had agreed to extensions of their capital commitments to avoid immediate liquidation. The attorney for Bleich and Donoghue was recommending their acceptance of the reorganization until December 31, 1975 (A-1093, 1645). The fact that they

disagreed with certain provisions and bargained hard was no different than numerous other entities (A-1633-1634).

If my actions were wrongful, which even for the sake of argument I do not accept them to have been, what do the Courts expect from the non-legally trained businessman? I was advised at every step along the way by the Finley, Kumble firm initially, and ultimately by the Kantor, Shaw & Davidoff firm whom I trusted and relied on to be right. I was not a part of a grand conspiratorial plan.

This record is filled with charges and counter-charges, most of a legal nature. Mr. Mandel argued that Gross' consent to the Transfer Agreement was legally required. Judge Ward decided otherwise. Mr. Mandel argues now that there were anti-trust violations growing out of the missed

Rafkind employment opportunity. Judge Owen decided otherwise. Our side argued that we had valid claims against Gross, Bleich and Donoghue. Judge Owen decided otherwise. I do not like hiding behind lack of knowledge, but if eminent lawyers and law firms on both sides are found to have imperfections in their assertions, how can I be expected to draw distinctions. I had every reason to believe that the claims finally asserted (not all were) against Gross, Bleich and Donoghue were good ones. The only dissent to their validity brought out at trial emanated from Mr. Mandel. Would I not have been derelict in my duty as an officer of Newburger, Loeb & Co., Inc. if I failed to assert what were believed to be good claims?

POINT II

THE LIQUIDATION OF NEWBURGER LOEB IN LATE 1970 OR EARLY 1971 WOULD HAVE ENORMOUSLY DAMAGED EVERY ENTITY CONNECTED WITH THE COMPANY. THE ALLEGEDLY ILLEGAL TRANSFER AGREEMENT AND THE ACTIVITIES LEADING UP TO IT HELPED CHARLES GROSS, MABEL BLEICH AND JEANNE DONOGHUE RATHER THAN HARMING THEM.

Judge Ward saw the issue clearly when in his decision he said, "The amount of injury, if any, that these

defendants suffered ... must abide proof at trial" (emphasis supplied). The trial proved that there were no damages.

To argue that I took something valuable from Mr. Gross by aiding in preventing this company's bankruptcy during 1970 and 1971 is no believable. To argue that Gross, Bleich and Donoghue would have been better off in a liquidation is not believable. If Gross, et al., really believed that, they would have carried out their threat to get a temporary restraining order (E-989, F,K-L) (A-2223), or they would have discussed the balance sheet openly with me at the January 15, 1971 meeting in Mr. Mandel's office (A-2341, 2342, 2907, 2988). No evidence was offered that they did any of these things. The fact that they did offer some protest is not persuasive. Their protests were considered at the time nothing more than the same hard bargaining that others were doing.

Mr. Gross argues that the firm could have self-liquidated as a non-clearing firm easily (A-2345, 2348, 2350, 2386, 2391), yet at the time he resigned, August 31, 1970, the firm was still a clearing firm, and I get no credit for spearheading the effort to

get Newburger out of the clearing business - the largest clearing agreement transaction to that date in the history of Wall Street (A-3426). Mr. Gross thought that there were problems and jeopardy for the firm associated with the clearing business (A-4486). Mr. Gross admits that it was a favorable event for Newburger to shed itself of the One New York Plaza lease, a $6,000,000 obligation (Tr.* 3798, 3799), although he thinks the price for so doing was high (A-2516). Yet at the time he resigned Newburger was still obligated under the lease and Kayne and Muh get no credit for their role in negotiating the settlement (A-2747), and then Mr. Gross has the temerity to argue that he should not be charged for the settlement cost, which will be discussed later. Nowhere does Mr. Gross argue that Newburger should have kept ownership of the Buffalo Braves. Indeed, under his stewardship Newburger was attempting to rid itself of the obligations caused by the

* Tr designates the actual Trial Transcript

purchase of the team (A-2471, Tr. 3797, 3920), and at the time of his resignation, Newburger had not found a buyer. Yet Mr. Muh's successful efforts to sell the team nowhere gets credit (A-2745).

Mr. Gross argues that I and others were involved in a conspiracy to harm him, yet he neglects that the exact same forces - namely, the salvaging of Newburger - successfully solved problems about which he agrees and that postdate his resignation. If we wanted to do the most harm to Mr. Gross, the simple way would have been to let the company dissolve on the day he submitted his resignation with the firm still in the clearing business, having a $6,000,000 lease obligation at One New York Plaza, facing all the obligations attendant to owning the Buffalo Braves, and having the myriad other problems testified to at trial.

Even as a non-clearing firm, liquidation would have had disastrous results. Mr. William Ragusin, an expert witness, testified that a liquidation would have wiped out all of the General and Limited Partners' capital and a part of the Subordinated Lenders' capital

(A-4203, 4221). Mr. Gross, in his testimony, infers without proof that the company was not in as bad shape as others saw it (A-2349). But one is forced to ask, how did the company have so much trouble (E-203, 206, 209) while Mr. Gross was the managing partner if he's so knowledgeable, and how can Mr. Gross deny direct knowledge with regard to operations on one hand (A-2434, 2446) and claim to be a savant of the brokerage business on the other (A-2351)?

Mr. Kenneth Bialkin, a partner from Wilkie, Farr who specialized in the securities field (A-633), was familiar with brokerage firm liquidations (A-647, 700) and represented subordinated lenders (A-638-640) testified that, in his opinion, his clients would have received only partial recovery (A-670, 690, 699, 700) if Newburger had been liquidated during the relevant time period. Mr. Bialkin's clients stood ahead of Mr. Gross in the payment hierarchy upon liquidation (A-641, 664, 670) and they had unquestionable access to the personal assets of the General Partners in the event of any shortfall from liquidation since they were general creditors (A-643, 644).

So Mr. Bialkin, with a clear priority, a clear claim against General Partners, and in depth knowledge of the relevant concerns, decided to go forward on the transaction. Mr. Bialkin's recommendations to his clients were based on his conviction that liquidation would cause damage to his clients (A-668-670). Mr. Bialkin took into consideration his recourse to the personal assets of the General Partners (A-692, 700, 704).

Albert Dworkin, a Subordinated Lender (A-3675), attorney and a C.P.A., elected to enter in the transaction because he was convinced that otherwise it was unlikely that he would recover all of his subordinated loan (A-3678-3685).

Mr. Gross, as a withdrawn Partner had an inferior claim to that of the Subordinated Lenders because they were General Creditors and his access to the personal assets of General Partners for any capital that might be due him is questionable in view of Section IX, Liquidation, paragraph 9.2 and 9.4, pp. 35, 36 and 37 of the Partnership Agreement (E- 446, 447, 448)

which seemingly eliminates the need to pay up capital deficits for the purpose of reimbursing positive capital positions. The idea of Section IX is that General Creditors are to be provided for either through existing Partnership funds or additional capital contributions by the partners. The contribution of funds for the "payment of capital partners" is specifically excluded in Paragraph 9.4. This means that partners can lose their capital - an ordinary concept - and that no partner was the guarantor of another partner's capital - another ordinary concept unless .... a particular partnership agreement provides otherwise, which this one did not. The fact that one partner could get into deficit while another remained in positive capital position was caused by capital contributions not correlating to percentages of profit and loss. Mr. Gross' answer to this has to be, that by withdrawing, reimbursement of monies to him would be considered other than "payment of capital to a partner." As for Bleich and Donoghue, they had not yet effectively withdrawn and, therefore, reimbursements to them would clearly be capital in nature and not required by 9.4.

Accepting for argument's sake that Mr. Gross, by withdrawing, changed his priority status for payment in event of liquidation, he nonetheless was clearly in an inferior position to the six (6) Subordinated Lenders representing $1.1 million in capital. Mr. Gross admitted on trial that at least $700,000 of Limited Partners' capital had given notice of withdrawal before he submitted his resignation on August 31, 1970 (Tr. 6076) Gross admitted that these withdrawals were the Estate of Morris Newburger, Mr. Wachs and Mr. Brown. And Mr. Mandel admits that by December 31, 1970, all Limited Partners, except Bleich and Donoghue, had given notice of withdrawal (A-755, 756) which was an additional 5 withdrawals, accounting for another $1.2 million. Clearly, the Limited Partners who submitted their notice of withdrawal at a time preceding Mr. Gross' notice stood ahead of him in priority in the event of liquidation. Arguably, any Limited Partner who submitted a withdrawal notice would have stood ahead of Gross by virtue of their being Limited rather than General Partners. Thus Gross would

still have had a priority or collectability problem assuming everything else he said about liquidation values and the Partnership Agreement were right. Furthermore, by December 31, 1970, Gross was not the only General Partner with positive capital who had given notice of withdrawal. Two others had withdrawn; Adolphus Roggenburg with capital of $147,681 and Edward Holt with $6,940 (A-4271) based on the Peat, Marwick statement. And they too might have had as good a claim as Gross' since the Partnership Agreement was silent on how to establish priority among withdrawn partners.

It is important to note that the 6 Subordinated Lenders, the 8 withdrawn Limited Partners, and the 2 withdrawn General Partners, just mentioned, were all signatories to the Transfer Agreement. In addition 2 General Partners in positive capital positions, but not withdrawn, Leo Stern $673,878 and Richard Stern $70,422 were signatories. None of these received "debt forgiveness." When Mr. Mandel argues on pp. 90 of his Post Trial Memorandum that the lever in the transaction was debt forgiveness to

9 individuals, he neglects the 18 parties, at least 9 of whom stood ahead of Gross on liquidation, who received no debt forgiveness. As will be discussed under the next point, there is a question about debt forgiveness in any event.

It would defy reason to argue that each of these entities entered into this transaction motivated by future profits. Many of the entities had already given notice of withdrawal, signifying their desire for the simple return of their capital. Two Estates were signatories and a profit motivation for agreeing to a transfer would raise question about their fiduciary responsibilities.

For the sake of argument, if Gross could overcome the problems of 9.4 and have monies due him considered other than capital, then the extent of damage to Gross on liquidation is influenced by the date of liquidation. If the company had entered liquidation before December 31, 1970, Gross' capital account would have been chargeable for his share of the losses incurred by liquidation through

operation of Section VIII Computing and Paying The Interest of a Former Partner, Paragraph 8.1(b), pp. 31 of the Partnership Agreement, (E-441, 442), which makes Gross' account chargeable for any costs within the year of withdrawal. Based on Ragusin's expert testimony, the total losses would have been $578,686 (A-4212) from asset write downs and $1,460,000 (A-4220) from increased liabilities, totaling $2,038,686. Based on a percentage for Gross of 14.21892%, which is agreed to by Peat, Marwick and Lauterbach, his share of the liquidation losses would have been $289,879.13, making Gross a deficit partner to the extent of $160,318.13 based on his capital position as established by Peat, Marwick. Thus, on liquidation, Gross too would have been a deficit partner and required to make up his deficit to the extent necessary to pay General Creditors claims.

If liquidation occurred after December 31, 1970, then Gross' capital account would not have been chargeable with the costs of liquidation, the amount having been fixed on December 31 of the year he withdrew by operation of Paragraph 8.1(b) of the Partnership Agreement. His capital

position would have been $129,561 using Peat, Marwick's report and perhaps he would have a claim for that much, but it would be inferior to the Subordinated Lenders and withdrawn Limited Partners previously mentioned. He would have to face the problems of priority and collectibility previously noted and be prepared to be a potential target of litigation by any unsatisfied General Creditors.

Thus, Charles Gross was helped, not harmed by this transaction, particularly in that it kept the company in operation beyond December 31, 1970. Bleich and Donoghue were aided by the continued existence of the company, providing time for their withdrawal to become effective, changing their status to withdrawn partners, and by the creation of a newly capitalized entity against which they could assert claims.

The Courts may ultimately decide that liquidation did not occur and to consider it in the hypothetical sense is improper. But at the time the events leading up to this transaction were taking place, the decisions of all entities

were being conditioned by the estimated outcome of liquidation. My role was just as much in behalf of the 18 who did not receive forgiveness as it was in behalf of the 9 who did. My role in preventing liquidation should not now result in the holding of me liable for conspiracy, absent a showing of improper conduct on my part, and this record does not provide such a showing.

POINT III

JUDGE OWEN ERRED IN ACCEPTING THE LAUTERBACH ACCOUNTING FIGURES RATHER THAN PEAT, MARWICK'S. SUCH A FINDING IS IN DIRECT CONFLICT WITH HIS FINDINGS ON "DEBT FORGIVENESS" - TWO OF HIS MOST IMPORTANT FINDINGS.

Judge Owen says on pp. 23 of his Opinion (Pl-530) "One Irving Lauterbach, an accountant, testified in detail as to the said Peat, Marwick figures and convincingly demonstrated that those figures were wholly inaccurate by reason of write-offs wrongfully attributed to the period in question", relying on Defendants VVVV (E-871). He goes on to

say that, "Removing these items from the Corporation's* balance sheet as Lauterbach demonstrated was proper, I conclude that there would have been sufficient assets in the Partnership ...." Thus, Judge Owen has found that the entire Peat Marwick Partnership's balance sheet is wrong, not just the Gross capital account. But he has also found that the transfer was accomplished in major measure by a 'forgiveness' of some $500,000 of partners' capital arrears ...." These findings are in direct opposition. If Lauterbach's figures are accepted, there was no debt forgiveness. Mr. Lauterbach's total adjustments were $1,465,369 (E-873, D-VVV). Giving other partners their share of these adjustments eliminates debt forgiveness in the aggregatd. Schedule I on pp. 39 of this brief is constructed by giving each partner his pro-rata share of the Lauterbach adjustments.

In the District Court, Mr. Mandel argued on pp. 90 of his Post Trial Memorandum that forgiveness in the amount of $524,171 had been given to General Partners:

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* Judge Owen must mean Partnership. The Corporation's balance sheet for that date was never submitted in evidence. My brief will refer to the Partnership not the Corporate balance sheet. (Nothing in the logic here would change if the Corporation's balance sheet at 12/31/70 were also in evidence.)

Andrew Newburger, Robert Stern, Robert Newburger, Harold J. Richards, Edward Holt, William A. McGovern, Sanford Roggenburg, Edmund Rubin, and Julius Schnall. After giving effect to the Lauterbach adjustments, the forgiveness is eliminated and instead there was an overpayment of at least $212,700 as shown by Schedule II, pp. 40 of this brief.

Forgiveness of Partners' capital arrears is a mainstay of Judge Owen's decision. It is the ribbon he uses to tie up the conspiracy package. Judge Owen says at pp. 10(Pl-514) when describing how the allegedly wrongful transfer took place, "This was accomplished in major measure by a 'forgiveness' of some $500,000 of partners' capital arrears ...." At pp. 24,(Pl-531) Judge Owen says that Defendants could have been paid from the $500,000 in capital arrears "had they been collected ...." Again on pp. 24, Judge Owen says when criticizing the Partnership for "wrongfully permitting the transfer" that, "This is especially egregious given the large amounts of capital forgiveness by which they were 'induced' to go along." But after giving effect to the Lauterbach adjustments, there is no such thing as $500,000 in capital arrears.

It now follows that one or the other of Judge Owen's findings must be rejected as incorrect. Nearly all of the Lauterbach adjustments must be rejected.

The items in Defendants VVVV, Schedule C, fall into different categories. Item 1 refers to an Atlas Realty settlement of $411,655. (E-874). The claim had been settled for that amount in November, 1970, and by December 31, 1970, $178,705 had already been paid towards the obligation leaving $232,950 to pay at December 31, 1970 (E-952, F,K-I). Not showing the contractual liability to Atlas would be fraudulent. Lauterbach's position is seemingly that Gross is not chargeable for the cost because it was extraordinary and incurred after the effective date of Gross' resignation, which is a legal not an accounting question and outside Mr. Lauterbach's expertise as a witness (A-2559, 2560). More importantly, the Partnership Agreement (D-U) provides in Section VIII, Computing and Paying The Interest of A Former Partner, Paragraph 8.1(b) on pp. 31 of that agreement (E-442), that "net income (or loss) for the year ...." shall be used in the calculation of the former partners' interest. This particular charge represented the settlement of an obligation

which arose under a lease negotiated in 1969 (A-3046, 3047, 4084) of premises at One State Street Plaza, to be occupied in February, 1971 and to run for 20 years at a total rent of $6,000,000 (A-2746, 2747, 2800, 2801, 4249, 4250). Section VI of the Partnership Agreement, Paragraph 6.1, Profits And Losses, provides that "In establishing the annual Net Profits of the business, the General Partners shall provide ... such accruals and reserves as to them seem proper and necessary." (E-431-432). It is generally accepted accounting principles that the cost of settlement should have been charged to the year 1970 (A-4149, 4152, 4153). There was no contradictory testimony.

Items 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 14 are all similar to each other and to Item 1. The write-offs were all costs, reserves for anticipated costs, or reevaluation of assets reflecting the condition of the business at December 31, 1970. No settlements were involved as is indicated in several items by Lauterbach (E-874). They were all in accord with accepted accounting principles as the letter of March 25, 1971 from Peat, Marwick attests in Finley, Kumble I (E-951). Mr. Alvey of Peat, Marwick testified

that the inclusion of ordinary and extraordinary costs in the net results for the year was in accord with accounting principles (A-4135). There was no contradictory testimony. If Peat, Marwick had disagreed with Newburger, they would have so informed Newburger (A-4142).

That the writeoffs were large in number, and also size in some case, is merely indicative that Newburger was emerging from a complex set of business difficulties, many of which were resolved during 1970, and accordingly their effects were required to be reflected in the books and records.

It was conceded at trial that Gross, et al., were probably correct in resisting the write-offs in Items 8 and 13 (A-2820, 2821, 2825, 2826). The concession and the opinion were mine, not Peat, Marwick's. Item 8 was for $11,661 and Item 13 for $15,000. Peat, Marwick and Lauterbach agreed that Mr. Gross' percentage share of the 1970 Partnership was 14.21892%. In my opinion, Gross is entitled to argue that his capital account as indicated in the Peat, Marwick statement is

larger by $3,791.

Item 14 related to tax carry back refunds. There is nothing in the record to justify including this as an asset. Mr. Dworkin, the lawyer and accountant who was handling the claims (A-3682), testified that nothing had been received on these claims at the time of the trial in July, 1975 (A-3684); that it would not have been proper to list these claims as an asset (A-3686, 3688) except at a very small amount at best (A-3690, 3691). I testified to like effect (S.M. A-2827).

In all events, the damages must be recalculated because of the unarguable contradictions in Judge Owen's Opinion that I have just demonstrated.

SCHEDULE I

General Partners	Partners' net * equity (deficit) before Lauterbach distributions	Lauterbach Distributions	Partners' net equity (deficit) after Lauterbach distributions
Leo Stern	$ 673,878	134,781	808,659
Robert L. Stern	(469,174)	261,634	(207,540)
Andrew M. Newburger	(511,766)	152,975	(358,791)
Robert L. Newburger	(208,321)	261,634	53,313
Charles H. Gross	129,561	208,360	337,921
George F. Conniff	(22,709)	10,790	(11,919)
Edward R. Hold	(6,768)	47,570	40,802
Harold J. Richards	(101,559)	69,572	(31,987)
Adolphus Roggenburg	147,681	15,590	163,271
Julius S. Schnall	(29,306)	19,820	(9,486)
John F. Thistleton	(5,930)	768	(5,162)
William S. McGovern	(21,267)	7,160	(14,107)
Ned D. Frank	(15,498)	43,051	27,553
Sanford Roggenburg	(1,671)	7,928	6,257
John F. Settel	(74,513)	67,977	(6,536)
Richard D. Stern	70,422	44,497	114,919
Louis Bracker	6,940	6,949	13,889
Fred Kayne	(3,984)	22,554	18,570
Edmund M. Rubin	(4,626)	12,784	8,158
Jacob Schaefer	(2,312)	6,392	4,080
Charles S. Sloane	(28,984)	22,554	(6,430)
Joseph L. Searles III	(7,173)	2,704	(4,469)
Robert Therese	(8,171)	25,033	16,862
Sub Total	(495,250)	1,453,077	957,827
Limited Partners			
Estate of Lester M. Newburger	250,000	-	250,000
Estate of Morris Newburger	526,334	-	526,334
Gerald M. Frank	396,042	-	396,042
Willard S. Irle	103,459	-	103,459
Jeanne G. Donoghue	75,000	-	75,000
Mabel Bleich	75,000	-	75,000
Jacob Wachs	61,648	-	61,648
Saul A. Brown	61,648	-	61,648
Benjamin F. Peyser	(18,519)	12,292	(6,227)
Phillip Shulman	230,718	-	230,718
Joseph Quarte	386,535	-	386,535
Sub Total	2,147,865	12,292	2,160,157
Total	$1,652,615	1,465,369	3,117,984

* Taken from Finley, Kumble I, last page entitled Capital

SCHEDULE II

	NAME	Peat, Marwick Statemdnt of Capital Surplus [Deficit]	Capital After Lauterbach Adjustments Surplus [Deficit]	To be Paid to Corporation per Transfer Agreement	Overpayment [Forgiveness] After Lauterbach Adjustments	Alleged [Foregiveness]
1.	Andrew Newburger	$[511,766]	$[357,497]	$359,022	$1,525	$[152,744]
2.	Robert Stern	[469,174]	[205,327]	293,430	88,103	[175,744]
3.	Robert Newburger	[208,321]	55,526	129,485	129,485 *	[78,836]
4.	Harold J. Richards	[101,559]	[31,398]	48,350	16,952	[53,209]
5.	Edward Holt	[6,768]	41,204	0	0 *	[6,768]
6.	William A. McGovern	[21,267]	[14,047]	0	[14,047]	[21,267]
7.	Sanford Roggenberg	[1,671]	6,324	0	0 *	[1,671]
8.	Edmund M. Rubin	[4,626]	8,266	0	0 *	[4,626]
9.	Julian Schnall	[29,306]	[9,318]	0	[9,318]	[29,306]
	Total				$212,700	$[524,171]

* In calculating overpayment it is arguable that an additional amount should be included for those partners whose capital position became positive after the Lauterbach adjustments, although that is not done here.

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CONCLUSION

All claims against Paul D. Risher should be dismissed. All damages should be set aside for a new accounting in the appropriate court.

Respectfully submitted,

PAUL D. RISHER
Pro Se Additional Defendant
On Counterclaims-Appellant-
Cross-Appellee
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New York, New York 10017
(212) 687-6474

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

PAUL D. RISHER, being duly sworn, deposes and says that deponent is Pro Se Additional Defendant on Counterclaims-Appellant-Cross-Appellee in this action, is over 18 years of age, and resides at 22 Pheasant Lane, Stamford, Connecticut. On February 4, 1977, deponent served the within Brief upon the following attorneys:

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the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in post-paid properly addressed wrappers, in an official depository under the exclusive care and custody of the United States Postal service within the State of New York.

PAUL D. RISHER

Sworn to before me this
4th day of February, 1977

STEPHANIE D. KAHN
Notary Public, State of New York
No. 31-4[illegible]81
Qualified in New York County
Term Expires March 30, 1977

COPY RECEIVED 4:40 pm

Feb 4, 1977

GOLD, FARRELL & MARKS

BY J Hodes

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Sullivan Wanglin & Kimball

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Anne Paisner

Debby Snyder
February 4, 1976
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Feb 4 1977
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